**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **DONALD D. DECKER** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 168,876 & 183,424 |
| **CONTINENTAL GRAIN COMPANY** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **INSURANCE COMPANY OF NORTH AMERICA** | ) | |
| Insurance Carrier | ) | |
| AND | ) | |
| | ) | |
| **KANSAS WORKERS COMPENSATION FUND** | ) | |

## ORDER

Claimant requested Appeals Board review of Administrative Law Judge Bryce D. Benedict's February 23, 1998, Award. The Appeals Board heard oral argument by telephone conference on September 23, 1998.

## APPEARANCES

The claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Michael W. Downing of Kansas City, Missouri. The Kansas Workers Compensation Fund appeared by its attorney, Mark W. Works of Topeka, Kansas. There were no other appearances.

## RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

## ISSUES

At the regular hearing held in this matter on July 10, 1995, the parties agreed that the two docketed claims should be consolidated for litigation purposes. Docket No. 168,876 alleged a date of accident of May 29, 1991, and Docket No. 183,424 alleged a date of accident of July 6, 1993. Respondent and the Workers Compensation Fund (Fund) do not dispute any issue in regard to the compensability of either claim.

In Docket No. 168,876, the Administrative Law Judge found claimant was entitled to permanent partial disability benefits based on a 25 percent functional impairment from claimant's date of accident of May 29, 1991, until claimant was permanently laid off by the respondent on September 9, 1993. Thereafter, the Administrative Law Judge found claimant was entitled to permanent total disability benefits of up to the $125,000 statutory maximum. The Administrative Law Judge further found respondent was erroneously required to pay claimant $65,551.59 of temporary partial disability benefits during the litigation of the case. The Administrative Law Judge ordered that all of the temporary partial disability benefits should be credited against the permanent total disability award.

In regard to Docket No. 183,424, the Administrative Law Judge found claimant suffered a temporary reinjury with no increase in permanent impairment. Accordingly, the Administrative Law Judge awarded claimant medical treatment and temporary total disability benefits for that work-related accident.

This case consists of a voluminous record which is also very confusing because the case was litigated over such a long period of time. In addition to the regular hearing; which was held at two different times, first before one Administrative Law Judge and a second time before a Special Administrative Law Judge; there were also six separate preliminary hearings held. Two of the preliminary hearings were held after the case had been submitted to the Administrative Law Judge for an award.

Claimant originally requested a prehearing settlement conference and regular hearing in a letter dated August 17, 1994, certifying claimant's medical condition was stable. The regular hearing was completed on August 24, 1995, and claimant submitted his case to the Administrative Law Judge for decision by a letter dated September 14, 1995. Respondent did not file a submission letter, but completed its case by deposition on October 30, 1995. However, because of the unusual circumstances surrounding these claims, no final award was entered until February 23, 1998, which is the award that is the subject of this appeal.

After the case was submitted, the claimant and the respondent entered into an agreed preliminary hearing Order dated March 6, 1996, that entitled claimant to future medical treatment with psychiatrist Steven Shelton, M.D. Following that order, claimant filed another application for preliminary hearing requesting, among other things, temporary

partial disability benefits. A preliminary hearing was held on May 29, 1996, where claimant also argued he had not met maximum medical improvement because he was in need of continuing psychological treatment for depression. As a result of that hearing, Special Administrative Law Judge William Morrissey entered the preliminary hearing Order dated June 5, 1996, that ordered respondent to pay claimant temporary partial disability benefits in the amount of $313 per week until a final award was rendered on the claim.

No activity then occurred in this case until the respondent filed an Application for Preliminary Hearing to terminate the temporary partial disability compensation payments. That hearing was held on January 14, 1998. In a preliminary hearing Order dated January 16, 1998, Administrative Law Judge Bryce D. Benedict found claimant's psychological treatment was maintenance only and terminated the temporary partial disability benefit payments. During the period from January 19, 1994, through January 23, 1998, claimant received 209.43 weeks or over four years of temporary partial disability benefits at $313 per week for a total of $65,551.59.

The principle issue in this case is whether the respondent is entitled to a credit against the permanent total disability award of $125,000.00 for the temporary partial disability payments, or whether the respondent must seek reimbursement from the Fund under K.S.A. 1990 Supp. 44-534a(b).

The Administrative Law Judge granted respondent a credit against the award. The claimant, however, contends there is no statutory authority for a respondent to receive a credit for benefits paid in a different case. The claimant contends the only statutory authority for respondent to be reimbursed for a preliminary hearing award paid by the respondent when the award is subsequently reduced or totally disallowed at the full hearing is pursuant to K.S.A. 1990 Supp. 44-534a(b). Claimant contends the July 6, 1993, work-related accident did result in a permanent injury and he is, therefore, entitled to a permanent partial disability award. Furthermore, the claimant contends that the permanent total award was not calculated correctly because both permanent partial and permanent total disability benefits cannot be awarded in the same case.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

### FINDINGS OF FACT

(1) Claimant commenced his employment with respondent on March 17, 1991, performing job duties as a welder, fitter, crane and forklift operator.

(2) On May 29, 1991, claimant was cutting the back from a scrapped railroad car with an acetylene torch when a three and one half foot metal piece of the railroad car fell on both of claimant's feet knocking him down and onto his back.

(3) Claimant was pinned under the heavy piece of scrap metal and a crane had to be utilized to lift the piece of metal off claimant. Claimant was then transported immediately by ambulance to the Atchison County Hospital.

(4) Claimant was treated at the hospital by orthopedic surgeon Thomas L. Shriwise, M.D. Dr. Shriwise diagnosed a severe bilateral crushed foot injury and a left iliolumbar back strain. Claimant's right foot had a displaced proximal phalanx fracture of the great toe and proximal fractures of the third, fourth, and fifth toe. The doctor surgically reduced and pinned the proximal phalanx of claimant's right great toe. As a result of these severe injuries, claimant experienced severe pain and was treated with intravenous pain medication.

Claimant was admitted to the hospital on the date of the accident and remained in the hospital until he had some mobility. On June 5, 1991, claimant was transferred to the hospital's skilled nursing facility.

Dr. Shriwise's primary treatment objective was to progressively improve claimant's mobility. Claimant was fitted with special shoewear to help curtail the pain in his feet along with continuing analgesic medication for the severe pain in both his feet and back. After claimant was discharged from the skilled nursing home, he attended an extensive physical therapy program at the Kansas Rehabilitation Center in Topeka, Kansas, from September 11, 1991, through January 3, 1992.

Dr. Shriwise also had claimant undergo a Functional Capacity Assessment (FCA) at the Kansas Rehabilitation Center on May 8, 1992. One of the FCA's conclusions was that claimant was unable to perform manual labor and any future work should be limited to sedentary work with no lifting.

Dr. Shriwise determined claimant had overall met maximum medical improvement on July 21, 1992. On that date, at the request of the respondent's insurance carrier, the doctor found claimant had continued pain in his feet and his low back. He diagnosed claimant with a bulging L4-5 disc with degenerative disc disease along with some mild borderline spinal stenosis. The doctor found claimant will continue to need pain and anti-inflammatory medications along with Trental, a medication to help blood circulation in his lower extremities. In accordance with the AMA Guides, Dr. Shriwise found claimant had a 20 percent whole body permanent functional impairment as a result of his work-related injuries to his feet and back.

Claimant's activities were restricted by Dr. Shriwise to standing or walking for six hours per day total with interludes of rest. At any given time, standing or walking was limited to one hour and sitting was limited to 45 minutes. Repetitive stomping, climbing, kneeling, or squatting activities were also restricted. Lifting was limited to 10 to 15 pounds from floor to waist level and a 200-pound limit was placed on pushing a cart.

(5) In February 1992, claimant started seeing his family physician, James H. McMechan, D.O., one or two times per month for the purpose of monitoring the various medications he was required to take as a result of his injuries. On a daily basis, claimant was required to take anti-inflammatory and pain medications along with an agent to increase circulation in his lower extremities. At the time the preliminary hearing held on January 14, 1998, claimant testified he remained under Dr. McMechan's care, seeing him once a month for the purpose of monitoring his medications. Also, claimant testified he was still taking anti-inflammatory and pain medications along with the agent to increase the circulation in his lower extremities.

(6) Additionally, on September 22, 1992, claimant started receiving chiropractic treatment from Stanley J. Farr, D.C. In November of 1992, the claimant represented to Dr. Farr that he desired to attempt to return to work instead of applying for Social Security Disability benefits. Dr. Farr then released claimant to return to light duty work on December 1, 1992, with restrictions of no climbing and a lifting limit of 40 pounds.

In an agreed order dated December 7, 1992, Dr. Farr was authorized to provide chiropractic care and treatment until further order of the Administrative Law Judge or agreement by the parties or release by Dr. Farr as having reached maximum medical improvement. Dr. Farr testified in this case on September 29, 1994. At that time, claimant remained under his care, and he felt claimant would need chiropractic treatment and care for the rest of his life. Both Dr. Shriwise and Dr. McMechan testified that they had recommended chiropractic treatment for claimant because such treatments had provided claimant increased flexibility and mobility. In fact, at the January 14, 1998, preliminary hearing, claimant testified he remained under Dr. Farr's care, receiving chiropractic treatment at least once per month.

(7) Claimant returned to light duty work for respondent on or about December 1, 1992. Before his injury, claimant was working ten hours per day but returned to work eight hours a day. He returned to welding duties but he was not able to climb on the railroad cars and could not operate either the crane or forklift because of the various medications he was required to take. Although claimant was able to perform the light duty work for eight hours until he was laid off in a general lay off on March 10, 1993, he testified he had continuing pain and discomfort as he worked and he had to increase his pain medication in February 1992, before the lay off in order to complete a workday. Also, the claimant testified he was only able to perform about 30 percent of the work he preformed before his injury.

(8) Claimant again returned to work for the respondent on June 17, 1993. He performed only light duty work and this time he only worked four hours per day. This return to work was arranged by respondent's insurance carrier's vocational rehabilitation counselor who convinced the respondent to make an attempt to return claimant to full time employment by starting him out gradually as a half-time employee.

Claimant worked only three weeks when he reinjured his low back while laying on his back prying open a frozen alley gate on a railroad hopper car. This accident occurred on July 6, 1993, and claimant sought medical treatment the next day from his family physician, Dr. McMechan. Dr. McMechan took claimant off work until August 1, 1993, when he returned claimant to work with restrictions of lifting limited to 20 pounds, avoid walking on concrete floors as much as possible, and all work duties should be preformed from a sitting position.

(9) Respondent returned claimant to light duty in the truck shop working four hours per day. On September 9. 1993, respondent permanently laid claimant off work. Claimant testified his foreman, Russell Myers, told him that the respondent laid him off because claimant simply could not handle the job.

(10) On January 19, 1994, claimant went to work for Phil Thompson, a personal friend of claimant and an owner of a machine shop in Boyle, Kansas. Claimant worked four hours per day when he was able to tolerate the pain and discomfort. Mr. Thompson allowed claimant to work less if the pain and discomfort became intolerable. Claimant testified he also was able to stop work and elevate his feet as needed and he was also allowed to lie down and rest as needed. Claimant performed very light work such as answering the telephone, sweeping, and performing other light janitorial duties, along with light sandblasting of small parts.

The record is not clear as to the length of time the claimant was employed at the machine shop. Claimant testified at the January 14, 1998, preliminary hearing that he did not receive temporary partial disability weekly payments until after he had quit his part-time job at the machine shop. Claimant testified that Dr. McMechan finally advised him to quit the part-time employment as the pain and discomfort were too much for him to continue work. The wage statement, entered into evidence at the May 29, 1996, preliminary hearing, indicated claimant had worked only six hours for the week ending May 23, 1996, but had earned a total of $1,597.50 from January 1, 1996, through May 23, 1996. Furthermore, claimant testified he worked eight hours in one week before he quit the machine shop job. Claimant also testified that was the week before he started receiving weekly compensation checks. After the May 29, 1996, preliminary hearing, respondent was ordered to pay claimant temporary partial disability benefits at $313 per week from January 19, 1994, the day claimant started working for the machine shop, and continuing until a final award was entered. The Appeals Board finds claimant's testimony and the

machine shop payroll records entered into evidence prove claimant quit his employment at the machine shop during the week ending May 23, 1996.

(11) After claimant's July 6, 1993, injury, his treating physician, Dr. Shriwise, at the request of respondent's insurance carrier, examined claimant for the purpose of determining claimant's permanent functional impairment. Dr. Shriwise in a report dated December 21, 1993, found claimant's status had not changed since his July 21, 1992, functional impairment rating. Dr. Shriwise also opined that claimant's July 6, 1993, injury was only a temporary aggravation of his low back injury and did not cause any further permanent injury.

(12) After the July 6, 1993, injury, Dr. Farr, expressed the opinion that claimant's functional impairment was 50 percent. But this was his personal opinion and not based on the AMA Guides.

(13) Also after the July 6, 1993, injury, Dr. McMechan believed claimant had a 75 percent disability. This 75 percent was likewise the doctor's personal opinion, and he expressed that the opinion was based on what he believed the claimant had lost in his ability to perform physical activities. Dr. McMechan did not use the AMA Guides and had no knowledge of the AMA Guides.

(14) Because the parties could not agree on a percentage of functional impairment, the Administrative Law Judge appointed Daniel D. Zimmerman, M.D., of Kansas City, Missouri, to perform an independent medical examination of claimant. Dr. Zimmerman saw claimant one time on January 31, 1995. Utilizing the AMA Guides Third Edition (Revised), Dr. Zimmerman opined that claimant's lower extremity injuries and back injury resulted in a 26 percent whole body impairment of function. He restricted claimant to occasional lifting of 20 pounds; frequent lifting of 10 pounds; avoid frequent bending, stooping, and crawling, activities. Dr. Zimmerman believed claimant fell in the less than sedentary work category because of his inability to either sit or stand for any appreciable period of time. Dr. Zimmerman also testified that claimant could not complete an eight hour work day. Taking into consideration claimant's high school education and his work history as a welder and manual laborer, Dr. Zimmerman did not know of any employment claimant retained the ability to perform.

Additionally, Dr. Zimmerman was asked to apportion claimant's 26 percent functional impairment rating between claimant's first accident on May 29, 1991, and his second accident that occurred on July 6, 1993. Initially he did not recall claimant had suffered a second work related injury on July 6, 1993. However, he then opined that 7 percent of the 26 percent functional impairment rating was apportioned to the first accident and 19 percent was apportioned to the second accident.

(15) Claimant commenced receiving psychiatric treatment from Steve Shelton, M.D., a Topeka, Kansas, psychiatrist, on June 29, 1995. Claimant was still under Dr. Shelton's care at the time the regular hearing was completed in this case on August 24, 1995.

Dr. Shelton testified by deposition on February 13, 1998, some two and a half years after the regular hearing. Claimant remained under Dr. Shelton's care at that time for chronic recurrent depression. Dr. Shelton was treating claimant with anti-depressant medication, mild tranquilizers, and psychotherapy sessions.

Dr. Shelton opined that claimant's psychological problems were directly traceable to his physical injuries. However, Dr. Shelton also attributed claimant's frustration and anger with the workers compensation system as a major contributor to his psychological problems. Dr. Shelton believed the conclusion of the workers compensation proceeding would improve claimant's psychological problems. The doctor testified that claimant had improved but still had his ups and downs and he was in need of further psychological care for at least the near future. He also opined the claimant was not capable of working from either a physical or a psychological perspective.

Dr. Shelton found claimant's mental impairment was characterized in the AMA Guides as marked impairment. The AMA Guides defines marked mental impairment as an impairment that significantly impedes the individual's ability to function. The doctor felt that definition fit the claimant and placed claimant somewhere in a 70 to 80 percent impairment range. On cross examination Dr. Shelton admitted that this was the first time he had ever expressed an opinion on mental impairment in accordance with the AMA Guides.

(16) Vocational expert Bud Langston testified in this case on behalf of the claimant and expressed his opinions on the impact the claimant's work-related injuries had on his ability to find work in the open labor market and earn wages.

Claimant was interviewed by Mr. Langston on March 18, 1994. Mr. Langston also reviewed the medical reports and records of Dr. Farr, Dr. Shriwise, and Dr. McMechan. Also available were the results of the FCA claimant completed on May 8, 1992.

At the time of the interview, claimant was working part time for Phil Thompson at the machine shop. Mr. Langston contacted Mr. Thompson by telephone and obtained information on claimant's specific job duties and how he was allowed to perform those job duties with his severe injuries. Mr. Langston concluded that the only reason claimant had obtained this part-time employment and was able to retain the employment was because his son was employed there and the owner of the machine shop was claimant's long-time friend. To make it through the workday, claimant was allowed to rest at any given time for the purpose of either elevating his feet because of the swelling or lying down to rest

because of the fatigue and pain. Mr. Langston believed this part-time job was so markedly accommodated that it could not be found in the open labor market.

After Mr. Langston considered claimant's dependence on medication, his limitations on walking, standing, and sitting, and his frequent need to rest while working, he was of the opinion that claimant was only capable of part-time employment. The Department of Labor's Dictionary of Occupational Titles does not address work less than full time, and therefore, Mr. Langston found claimant had a 100 percent loss of ability to find work in the open labor market. Because claimant at that time was able to perform the accommodated part-time job at the machine shop, his wage loss was 81 percent. However, as a practical matter, Mr. Langston opined claimant at his present level of function was not employable in the open labor market.

(17) Respondent employed vocational expert Michael J. Dreiling, Director of Menninger Return To Work Center in Kansas City to formulate a vocational opinion regarding the vocational losses claimant experienced as a result of his work-related injuries. Mr. Dreiling did not interview the claimant but was provided with Mr. Langston's report and deposition plus the medical reports and records of claimant's examining and treating physicians.

Mr. Dreiling found claimant to be employable in the sedentary to restrictive light work categories. He felt the best evidence of claimant's employability was his actual ability to work part-time at the machine shop. However, based on Dr. Zimmerman's restriction that claimant was not capable of even performing sedentary work, Mr. Dreiling opined that claimant could not return to any type of work and would experience a 100 percent loss.

(18) The Appeals Board adopts the findings contained in the Administrative Law Judge's Award that are not inconsistent with the findings above.

## CONCLUSIONS OF LAW

(1) On claimant's first date of accident, May 29, 1991, K.S.A. 1990 Supp. 44-510e(a) defined permanent partial general disability benefits as follows:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the

> extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence.

(2) However, K.S.A. 1990 Supp. 44-510e(a) further provides there shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to his pre-injury average weekly wage.

(3) A worker is entitled to permanent total disability benefits in the amount of $125,000 if the evidence proves his work-related injuries have rendered the worker completely and permanently incapable of engaging in any type of substantial and gainful employment. *See* K.S.A. 1990 Supp. 44-510c(a)(2) and K.S.A. 1990 Supp. 44-510f(a)(1).

(4) Based on treating orthopedic surgeon Dr. Shriwise's opinion, the Administrative Law Judge concluded there was no permanent injury or impairment as a result of claimant's second accident that occurred on July 6, 1993.

The Appeals Board agrees with the Administrative Law Judge. The most persuasive medical evidence contained in the record is Dr. Shriwise's opinion as he was the only physician who treated and examined claimant for his orthopedic injuries both before and after the July 6, 1993, accident.

The Appeals Board concludes that claimant did not suffer any further permanent injury as a result of the July 6, 1993, accident.

Additionally, the Appeals Board concludes claimant reached maximum medical improvement as opined by Dr. Shriwise following his examination of claimant on July 21, 1992. The Appeals Board acknowledges that claimant received additional medical treatment from Dr. Shriwise, Dr. McMechan, Dr. Farr, and Dr. Shelton after that date. However, such medical treatment was ongoing maintenance treatment claimant needed to manage and tolerate the pain, discomfort, and depression caused by the severe disabling injuries he sustained on May 29, 1991.

(5) Although claimant requested a prehearing settlement conference and a regular hearing in a letter dated August 17, 1994, which also certified claimant was medically stable, he now argues that only his physical condition was stable at that time but his psychological condition was not. At the same time, claimant does not argue a final award should not be entered in this case. Psychiatrist Dr. Shelton established that claimant was in need of ongoing psychological treatment for depression that was directly traceable to his physical injuries. However, taking Dr. Shelton's testimony as a whole, the evidence is that claimant's depression will improve in the near future if claimant's workers compensation

case can be finalized. The Appeals Board, therefore, concludes that claimant is in need of continuing psychological treatment with Dr. Shelton. But the evidence does not establish that this continued psychological treatment will increase claimant's ability to work. Accordingly, claimant's ongoing need for psychological treatment does not preclude this case from going to a final award.

(6) The Administrative Law Judge found claimant's preinjury average weekly wage for the May 29, 1991, accident was $467.90 before the respondent terminated fringe benefits on December 20, 1993, and $605.80 after the termination of fringe benefits.

After the July 6, 1993, accident, the Administrative Law Judge found claimant's preinjury average weekly wage was $432.02 before the respondent terminated fringe benefits and $577.40 after respondent terminated fringe benefits.

These average weekly wage amounts, as found by the Administrative Law Judge, were not disputed by the parties and the Appeals Board adopts those findings as its own.

(7) The Administrative Law Judge concluded and the Appeals Board agrees that claimant's work related injuries have rendered him unable to perform substantial gainful employment. Accordingly, claimant is realistically unemployable and is entitled to a permanent total disability award as provided for in K.S.A. 1990 Supp. 44-510f(a)(1) of $125,000. *See* Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

(8) As concluded above, claimant's entitlement to permanent disability benefits is related to his first work-related May 29, 1991, accident. Claimant's second accident of July 6, 1993, resulted only in a temporary aggravation of his preexisting low back injury. The Appeals Board acknowledges that claimant returned to work for respondent on December 1, 1992, after the first accident, and worked eight hours per day until respondent laid him off on March 10, 1993. However, claimant established through his testimony that he returned to light welding and even while performing the light work he was required to increase his pain medication in order to complete a work day. Claimant could not have continued working an eight hour day. Furthermore, claimant also admitted he was only completing about 30 percent of his work. Thus, claimant was not performing a regular job that would be available in the open labor market. Nevertheless, because claimant was earning comparable wages during this period of employment, his permanent partial disability benefits are limited to his permanent functional impairment rating. *See* K.S.A. 1990 Supp. 44-510e(a).

The Appeals Board concludes the appropriate permanent functional impairment rating is claimant's treating physician Dr. Shriwise's 20 percent rating that was based on the AMA Guides to Evaluation of Permanent Impairment Third Edition (Revised).

The Appeals Board acknowledges Dr. Shelton gave a mental impairment opinion based on the AMA Guides but there is no evidence claimant had a mental impairment when he returned to work on December 1, 1992, after the first accident, and worked until respondent laid him off on March 10, 1993. Accordingly, Dr. Shelton's mental impairment opinion does not apply to this period of claimant's disability.

(9) After respondent laid claimant off on March 10, 1993, he was returned to work on June 17, 1993, to four hours per day performing light duty work. Then after claimant's July 6, 1993, injury, he again was returned to a four hour per day light duty job with respondent. After the respondent permanently laid the claimant off because he was unable to do the job, claimant returned to a four hour per day job working for his friend Phil Thompson in a machine shop. The Appeals Board finds the record supports the conclusion that all of the four-hour jobs, whether working for the respondent or for the machine shop, were specifically designed to accommodate claimant's severe disabling injuries. Further, they did not constitute substantial gainful employment.

Therefore, as summarized below, the Appeals Board concludes claimant is entitled to benefits consisting of temporary total disability, permanent partial general disability, and permanent total disability paid over the following periods to the statutory maximum of $125,000:

(A) After the May 29, 1991, accident, claimant was completely and totally disabled from May 30, 1991, through November 30, 1992, and is entitled to temporary total disability benefits at the maximum weekly compensation rate of $278.00.

(B) From December 1, 1992, through March 10, 1993, claimant is entitled to permanent partial general disability benefits based on his permanent functional disability rating of 20 percent which computes to a permanent partial general disability weekly rate of $62.39.

(C) Following the March 10, 1993, layoff, claimant was permanently and totally disabled. The Appeals Board acknowledges claimant returned to accommodated part-time work both for respondent and the machine shop until May 23, 1996. However, as concluded above, those part-time four hour per day accommodated jobs cannot be considered substantial gainful employment.

Also, since the July 6, 1993, accident did not result in any further permanent injury, all the time claimant was off work and under medical treatment is attributed to the May 29, 1991, injury.

(10) The Appeals Board further concludes that the respondent, pursuant to K.S.A. 44-525(b) (Ensley), should be given credit for all amounts previously paid to the claimant. Those amounts paid would include the 209.43 weeks of temporary partial disability benefits paid at $313 per week in the total amount of $65,551.59. The Fund is only required to

reimburse the respondent for overpayment of medical, temporary total disability benefits or temporary partial disability benefits under K.S.A. 1990 Supp. 44-534a(b) when there is not a final award of additional benefits for the overpayment to be credited against or the final award of disability benefits is less than the amount of the credit. *See* Wogan v. Consolidated Freightways, Inc., Docket No. 201,820 (March 1998).

(11) Claimant makes the argument that both permanent partial and permanent total disability benefits cannot be awarded in the same case because the disability relates back to the date of accident. The Appeals Board disagrees and concludes for one date of accident different permanent or temporary disabilities may be awarded depending on claimant's physical condition and whether he is working or, in some circumstances, his ability to work.

(12) The Appeals Board concludes as did the Administrative Law Judge that claimant has proved that his severe, disabling injuries will require future medical treatment and respondent is ordered to provide such treatment through authorized physicians, Dr. McMechan, Dr. Shelton, and Dr. Farr.

(13) Claimant is entitled to other future medical treatment upon application and approval of the director.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict, dated February 23, 1998, should be, and is hereby modified as follows:

### DOCKET NUMBER 168,876

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Donald D. Decker, and against the respondent, Continental Grain Company, and its insurance carrier, Insurance Company of North America, and the Kansas Workers Compensation Fund, for an accidental injury sustained on May 29, 1991, and based upon an average weekly wage of $467.90 before December 20, 1993, and $605.80 after December 20, 1993.

Claimant is entitled 78.71 weeks of temporary total disability compensation at the rate of $278 per week or $21,881.38, followed by 14.29 weeks of permanent partial compensation at the rate of $62.39 per week or $891.55 for a 20% permanent partial disability, followed by 367 weeks of permanent total compensation at the rate of $278 per week, followed by one week at $201.07, for a permanent total disability award of $125,000.

As of January 30, 1999, there is due and owing claimant 78.71 weeks of temporary total disability compensation at the rate of $278 per week or $21,881.38, followed by 14.29 weeks of permanent partial compensation at the rate of $62.39 per week or $891.55 for a 20% permanent partial disability, followed by 307.43 weeks of permanent total compensation at the rate of $278 per week in the sum of $85,465.54 for a total of $108,238.47, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $16,761.53 is to be paid for 59.57 weeks at the rate of $278 per week and one week at $201.07 until fully paid or further order of the Director.

The Fund and the respondent have stipulated that the Fund shall be responsible for 50 percent of the award.

All authorized medical expenses are ordered paid by the respondent.

All other orders contained in the Award are adopted by the Appeals Board.

**DOCKET NUMBER 183,424**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict, dated February 23, 1998, is affirmed in that claimant suffered no further permanent injury as the result of the July 6, 1993, accident, however, any claimed benefits under this docket number are denied as all workers compensation benefits due the claimant are ordered paid in Docket Number 168,876 with an accident date of May 29, 1991.

**IT IS SO ORDERED.**

Dated this ____ day of January 1999.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: John J. Bryan, Topeka, KS
Michael W. Downing, Kansas City, MO

Mark W. Works, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director